No. 15-674

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, et al.,

Petitioners,

v.

STATE OF TEXAS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF MARICOPA COUNTY ARIZONA SHERIFF, JOSEPH M. ARPAIO, IN SUPPORT OF RESPONDENTS

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INTRODUCTION[1]

This brief supports the Respondents, who are twenty-six (26) states who are plaintiffs below.

Pursuant to Rule 37.3 of the Rules of the Supreme Court, the parties have given their consent to the filing of this *amicus curiae* brief, the Petitioners by their blanket consent filed by Solicitor General Donald B. Verilli, Jr., on March 2, 2016, and the Respondents by J. Campbell Barker of the Office of the Attorney General of Texas, the attorney designated by the Respondents to respond to requests for consent to file *amicus curiae* briefs.

Sheriff Joseph M. Arpaio ("Sheriff Arpaio") respectfully submits this *amicus curiae* brief in his role as the elected Sheriff and head of the Maricopa County Sheriff's Office ("MCSO"). Arizona's Maricopa County has four (4) million residents.[2] Maricopa County would be larger than twenty-two (22) States if it were a State and is larger than twelve (12) of the plaintiff states here: Mississippi, Maine, Kansas, Oklahoma, West Virginia, Arkansas, Nebraska, Utah,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amicus curiae*, its members, or it counsel made a monetary contribution to its preparation or submission.

[2] "State Population by Rank, 2013", InfoPlease, http://www.infoplease.com/us/states/population-by-rank.html

Idaho, Montana, South Dakota, and North Dakota, according to the 2010 U.S. Census, April 1, 2010.[3]

With great respect for this Court, Sheriff Arpaio submits that this Court should affirm the U.S. Court of Appeals for the Fifth Circuit's ("Fifth Circuit") decision upholding a preliminary injunction requested by the Respondents, including finding standing.

INTEREST OF *AMICUS CURIAE*

Sheriff Arpaio filed a related case on November 20, 2014, though also challenging the Petitioners' earlier June 2012 Deferred Action for Childhood Arrivals ("DACA"), as well as the Petitioners' November 20, 2014, expansion of that earlier program. *Arpaio v. Obama*, 27 F. Supp. 3d 185 (D.D.C. 2014), affirmed, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 900 (2016) (Case No. 15-643).

Here, in the proceedings below in the Fifth Circuit, the Petitioners relied upon arguing about Sheriff Arpaio's own case in the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). Brief for the Petitioners, Fifth Circuit, Appeal No. 15-40238, pages 7, 44, 50, 53. Indeed, before the Supreme Court now, the Petitioners again cite to and rely upon *Arpaio v. Obama*. Brief for the Petitioners, March 1, 2016, page 44.

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[3] Accessible at: http://censtats.census.gov/usa/usa.shtml

Because the Petitioners here incorporated Sheriff Arpaio's case into their arguments and briefs in the courts below and also here, *amicus curiae* Arpaio has a significant interest.

Moreover, Sheriff Arpaio has insights and experiences pertinent to this appeal with which he is able to respectfully assist the Court.

Joe Arpaio has been the Sheriff elected by the voters of Maricopa County since 1993. He has worked as a federal narcotics agent, successfully infiltrating drug organizations from Turkey to the Middle East to Mexico and Central and South America, and in cities around the United States. His expertise led him to top management positions around the world with the U.S. Drug Enforcement Administration (DEA). He served as head of the DEA for Arizona.

Maricopa County is significantly affected by citizens from other countries trespassing across the nation's southern border, rather than entering at official border crossings, and transiting through or residing in Maricopa County. Arizona shares 390 miles of border with Mexico. Many of those who disregard the law to enter also commit other crimes under Arizona State law, from trampling farms, breaking into homes and farms, to threatening families and disregarding a wide variety of other laws.

MCSO encounters citizens of foreign countries illegally present in our country – for whom their own country's government is responsible – (hereinafter

"deportable foreign citizens") during the course of MCSO deputies investigating complaints about criminal activity pursuant to Arizona State law.

On June 15, 2012, Petitioners launched their DACA program. As a result, from February 1, 2014, through December 17, 2014, the financial harm from deportable foreign citizens to MCSO was at least $9,293,619.96 consisting of the costs of holding deportable foreign citizens in the Sheriff's jails, for those inmates flagged with Immigration and Customs Enforcement ("ICE") "detainers." These costs of jail confinement are but one financial impact, easily quantified among other impacts.

Accordingly, on November 20, 2014, *amicus curiae* Arpaio filed a complaint in the U.S. District Court for the District of Columbia, *Arpaio v. Obama*, Civil Case 1:14-cv-01966, challenging the same programs and/or regulations as addressed in this case. His complaint was dismissed on standing grounds on December 23, 2014. The U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") affirmed in Appeal No. 14-5325 on August 14, 2015.

SUMMARY OF ARGUMENT

This case implicates whether the United States will be a nation governed by the rule of law or by the rule of men through fiat. These exact changes in the law were rejected by Congress.

This Court's charter is to safeguard the Constitution against whatever encroachments future presidents may undertake. Before the Court is the decision not only whether a flagrant disregard of the constitutional architecture today is unconstitutional but also whether it will embolden future presidents to disregard the Constitution even further.

On the merits of their "deferred action" program, the Petitioners claim four main arguments in the courts below: (1) The executive branch has the inherent authority to decline to enforce the law as prosecutorial discretion (deferred action). (2) Because Congress has not appropriated sufficient funds to deport all deportable foreign citizens, the executive branch has the right to rewrite the statutes as it pleases. (3) The executive branch is not actually changing the law at all, just prioritizing enforcement. (4) Congress delegated broad authority to the executive branch including the authority to change the law.

Sheriff Arpaio submits respectfully to the Court that: (A) Congress restrained the exercise of the Petitioners' discretion in 8 U.S.C. § 1229a(a)(3), such that the Petitioners' assertion of unfettered discretion is erroneous. (B) The Petitioners were obligated to inform Congress during the budget process if they need more funding – but they did not. Congress has voted more funds for immigration enforcement than the president's budget requested, at least since 2006. The Petitioners' representation here before this Court is in conflict with their budget submission to

Congress. (C) Sheriff Arpaio's experience demonstrates that deportable foreign citizens are detected by state and local law enforcement and courts and handed over to ICE for deportation.

This case now at bar is an *interlocutory* appeal from a preliminary injunction. The case continues in the Southern District of Texas. Further facts may develop on the Respondents' basis for standing and arguments that the Appellant's deferred action programs are binding and not guidance.

The Fifth Circuit's opinion is reported at 809 F.3d 134 (5th Cir. November 9, 2015) (Appeal No. 15-40238). (*See* Appendix to the Petitioners' Brief ("Pet. App.") 1a-55a). A related, earlier opinion of the court of appeals denying a stay pending appeal is reported at 787 F.3d 733 (5th Cir. May 26, 2015) (Appeal No. 15-40238). (Pet. App. 156a-243a.) The opinion of the district court is reported at *Texas v. United States*, 86 F. Supp. 3d 591 (February 16, 2015). (Pet. App. 244a-406a.)

ARGUMENT

I. OVERVIEW

Both the Fifth Circuit and the U.S. District Court for the Southern District of Texas ("Southern District") by the Honorable Andrew Hanen decided only so much as was necessary to sustain the preliminary injunction. Memorandum Opinion and Order ("Hanen

Opinion"), Civil Case No. B-1:14-cv-00254, Southern District of Texas, Judge Hanen, February 16, 2015, page 51 (additional analysis needed); page 68; Opinion, Fifth Circuit, November 9, 2015 ("Fifth Circuit Opinion"), pages 12, 16, 67-68. They did not exhaust all the bases for supporting the preliminary injunction or an ultimate judgment.

The Respondents asserted many different grounds for their standing to bring suit. *See*, *e.g.*, Hanen Opinion, pages 22-31 (cost of driver's licenses in only Texas so far), 36-42 (*parens patriae* standing), 36, 43-56 (*Massachusetts v. EPA* or special solicitude standing), 57-66 (abdication standing). Thus, the Respondents may be able to establish standing as the case continues in the Southern District of Texas even if the Fifth Circuit were reversed.

II. RESPONDENTS' "DEFERRED ACTION" VIOLATES "TAKE CARE" CLAUSE OF THE CONSTITUTION, Art. II, § 3.

In light of *amicus curiae's* role to assist the Court with additional insights, as opposed to repeating the parties' presentations, *amicus curiae* offers these supplementary arguments on additional topics. This focus on supplementary arguments, of course, is not intended to minimize the arguments of the Respondents which are important and central to their case.

A. Congress Has Expressly Restricted the Executive Branch's Exercise of Discretion

An important statute should be considered more prominently in *amicus curiae's* opinion. Petitioners claim they are exercising the executive branch's inherent authority. But statutes passed by Congress, not administrative policy, are the exclusive authority on these questions:

8 U.S.C. § 1229a(a)(3) requires:

> **"Exclusive procedures: Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States."**

Thus, while a statute does charge the Secretary of Homeland Security with authority to develop national immigration policy and priorities, 6 U.S.C. § 202(5), as Petitioners argue, Brief for the Petitioners, page 2-4, 44-44, 69-70, the statute ***simultaneously restrains*** DHS in the exercise of that authority. The Secretary's authority under 6 U.S.C. § 202(5) and DHS' procedures for enforcing deportation of deportable foreign citizens are constrained by 8 U.S.C. § 1229a(a)(3).

The executive branch has been commanded by statutes enacted by Congress to deport to their own countries of citizenship an estimated 11.3 million

citizens of foreign countries in the United States. *See, e.g.*, 8 U.S.C. §§ 1227, 1229a, 1231.

B. Executive Branch Admits that Petitioners Cannot Rewrite Statutes by Deferred Action

The parties have not emphasized the extent to which the Petitioners have *admitted* that their expansion of deferred action is unconstitutional.

To provide legal justification for Respondents' deferred action programs in the public discussion, the U.S. Department of Justice published a 33 page Memorandum[4] publishing the legal analysis and advice of the OLC. It was explicitly published on the Petitioners' behalf.

But the core problem is that while the OLC identifies certain conduct that could be legal, the Petitioners are not doing what the OLC identified as legal. Petitioners are actually doing what the OLC Memorandum warned them not to do.

On page 24, the OLC Memorandum *admits* on behalf of the Petitioners as their agent that:

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[4] U.S. Dept. of Justice, Office of Legal Counsel, "*The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*," Nov. 19, 2014 (hereinafter "OLC Memorandum"), pages 9-10. (JA 39-101).

> Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4).

On page 6, the OLC Memorandum *admits* on behalf of Petitioners that:

> Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id.* at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

On page 7, the OLC Memorandum *admits* on behalf of Petitioners that:

> Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v.*

> *Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, "the President is required to act in accordance with the laws – including the Constitution, which takes precedence over other forms of law").

The Appellant's November 20, 2014, Memoranda purporting to change the law are not only in violation of the Constitution and the "Take Care" clause – but the executive branch admits it.

C. Facts Not in Evidence: Congress Not Appropriating Funds Does Not Empower Petitioners to Rewrite the Statute

Petitioners claim authority to rewrite laws enacted by Congress because they cannot afford to deport all deportable foreign citizens. "**Limited appropriations**

make broad discretion a practical necessity." Brief for the Petitioners, page 3.[5]

> "The exercise of discretion to take into account resource constraints, humanitarian concerns, and other equities as part of a broader enforcement strategy is not a violation of the Take Care Clause – it is a vital component of the faithful execution of the laws. . . . [F]unding limits require the exercise of discretion on a vast scale."

See also Brief for the Petitioners, at 75 (citing resource constraints).

Petitioners say DHS has inherent authority to grant regulatory benefits to some deportable foreign citizens and deport only those of higher priority for removal. The executive branch claims that if they do not have the funds to deport all deportable foreign citizens, therefore they are entitled to rewrite the laws that Congress enacted and a prior president signed into law.

However, the Petitioners never established in the record that they ever asked for the appropriations and/or resources they claim they lack. There is nothing in the record supporting this. If DHS needs more funding to carry out Congressional enactments, DHS was required to inform Congress. But it never did.

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[5] Appellants have significantly downplayed this argument from prior briefs below and in Case No. 15-643 after Sheriff Arpaio highlighted the defects in the argument in his Petition there. However, the argument is still included before this Court.

The Petitioners represent to this Supreme Court a different reality than their budget submissions to Congress. Each Federal department and agency is required under the Budget and Accounting Act of 1921 (as amended)[6] to forward its projected needs for carrying out its mission to the Office for Management and Budget. OMB then submits a consolidated budget request for the entire Federal government to the U.S. Congress. *Id.*

The Petitioners make one claim to this Supreme Court about the funding they need, Brief for the Petitioners, pages 3, 75, but made a different claim to Congress.

Congress appropriated about $814 million ***more*** for ICE than the DHS requested from fiscal year 2006 through fiscal year 2014.[7]

Congress appropriated nearly $465 million ***more*** for the U.S. Citizenship and Immigration Service ("USCIS") than DHS requested from fiscal year 2006 through fiscal year 2014. *Id.*

Also, Petitioners offer sleight of hand, by implying that all deportable foreign citizens must be deported in one single year. Petitioners compare a

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[6] 31 U.S.C. § 1101, et seq.; OMB Circular No. A-11 (2014), Section 15: Basic Budget Laws, http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s15.pdf

[7] *See*, Budget information submitted to Congress by the U.S. Department of Homeland Security, "DHS Budget," http://www.dhs.gov/dhs-budget.

single year's budget with the total estimated population of deportable foreign citizens. On the contrary, state and local law enforcement regularly encounter deportable foreign citizens during the course of their other duties. ICE can deport them as they are encountered. There is no need for any special mechanism or any timetable.

Federal courts have recognized that Congress often appropriates money on a step-by-step basis, especially for long-term projects. Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a project. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (when statutory mandate is not fully funded, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint").

The Supreme Court has explained that courts should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated. *See TVA v. Hill*, 437 U.S. 153, 190, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (doctrine that repeals by implication are disfavored "applies with even greater force when the claimed repeal rests solely on an Appropriations Act"); *United States v. Langston*, 118 U.S. 389, 394 (1886) ("a statute fixing the annual salary of a public officer at a named sum . . . should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount

for the services of that officer for particular fiscal years"); cf. 1 GAO, Principles of Federal Appropriations Law at 2-49 (3d ed. 2004) ("a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation").

As a result, the Petitioners cannot rewrite the immigration laws of the country claiming a lack of resources they never asked for.

Congressional appropriations include public hearings in appropriations committees that flesh out whether DHS is inflating its cost estimates, using ineffective or inefficient methods, and being cost-effective in how it deports deportable foreign citizens.

D. Facts Not in Evidence: Local Law Enforcement, not the Federal Government, Locate Deportable Foreign Citizens for Deportation.

The Petitioners have also established nothing in the factual record to support their claim that DHS needs more resources to fully enforce the Immigration and Naturalization Act of 1952 (as amended) ("INA"). Sheriff Arpaio knows from his experience in the field that the Petitioners' argument depends upon an erroneous premise. Enforcement of the law is not driven by the efforts of the federal government.

Not only are these factual details missing from the record, but the argument is illogical and flawed. Sheriff Joe Arpaio's office encounters deportable foreign citizens during the course of responding to and

investigating complaints from civilians of crimes that complaining witnesses have suffered. State and local law enforcement are the main avenue through which deportable foreign citizens are encountered, discovered, and handed over to ICE for deportation. Those deportable foreign citizens unexpectedly discovered out in the field are handed over to ICE.

The driving force is complaints from civilians that a crime has been committed. ICE actually freerides on the resources of state and local law enforcement. At state and local expense, deportable foreign citizens are handed over to ICE for deportation. The Petitioners have not established in the record why or how ICE needs to expend any resources to deport deportable foreign citizens discovered by state and local law enforcement and handed over to ICE.

E. Petitioners Do Not Point to Any "Gap," Ambiguity, or Uncertainty in the Statute Requiring Exercise of Delegated Law-Making Authority

Another issue that should supplement the briefing of the parties to further assist the Court is whether there is any ambiguity or gap in the INA, which require interpretation, regulation, or guidance to supplement.

The Petitioners do not have the discretion they claim as delegated law-making authority because they have failed to identify any aspect of the INA that is unclear or incomplete in the absence of administrative clarification. The Petitioners' only complaint is that

they have never asked Congress for more funding to fully implement the INA and that they just don't agree with what Congress decided in enacting the INA.

There are times when Congress delegates law-making authority to the executive branch explicitly or implicitly to "fill up the details." The U.S. Supreme Court in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825) discussed Congress having delegated power to the federal courts to fill in details. So-called "gaps" or uncertainties or questions left unaddressed within congressional enactments are deemed to create inherent, implied delegations of law-making authority necessary to implement the statute.

But strikingly absent here, Petitioners do not point to any term of the INA that is ambiguous, uncertain, or otherwise requires filling. On the contrary, Respondents just don't like the law that Congress passed.

III. A STATE VOLUNTARILY PROVIDING A SUBSIDY TO BENEFICIARIES HAS ARTICLE III STANDING

The parties have extensively addressed the question of standing based on the expense of the State of Texas being forced to issue driver's licenses to regulatory beneficiaries. Sheriff Arpaio seeks to supplement this well-trodden ground, rather than retracing the parties' paths.

Whether the Respondents have standing to bring this suit cannot be separated from considering what is required to establish standing.

A. D.C. Circuit Judge Janice Rogers Brown Warns of Need to Reform Standing

This Court urgently needs to reform and correct standing jurisprudence for the reasons forcefully presented by Judge Brown of the D.C. Circuit. Her opinion arises from Sheriff Arpaio's related case. But Judge Brown's appeal for a review of standing concepts clearly transcends any particular case. Starting on page 24, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 900 (2016) (Case No. 15-643), Judge Brown explained (emphases added):

> BROWN, *Circuit Judge*, concurring: Today we hold that the elected Sheriff of the nation's fourth largest county, located mere miles from our border with Mexico, cannot challenge the federal government's deliberate nonenforcement of the immigration laws. I agree with my colleagues that the state of the law on standing "requires, or at least counsels, the result here reached." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 798 (D.C. Cir. 1987). But, recognizing that Sheriff Arpaio's claims reflect the widespread perception that the administration's prosecutorial discretion meme is constitutionally problematic, **I write separately to emphasize the narrowness of today's ruling, and note the consequences of our modern**

obsession with a myopic and constrained notion of standing.

Judge Brown then starts to identify how the current state of the law on standing is clearly a problem, on pages 25-27:

> Some may find today's outcome perplexing. Certainly Sheriff Arpaio cannot be blamed for believing he had standing. The relevant judicial guide-posts do not exactly "define[ ]" standing "with complete consistency." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). And some cases suggest standing can be satisfied based on fairly ephemeral injuries and attenuated theories of causation. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 516-26 (2007).
>
> Indeed, at first blush, Sheriff Arpaio's allegations appear somewhat similar to those the Supreme Court found sufficient to secure standing in *Massachusetts v. EPA*. That case revolved around EPA's decision not to regulate green-house gas emissions in new vehicles. Then, as now, standing consisted of a tripartite test. Plaintiffs must show they were or will be concretely injured by an action fairly traceable to the defendant and redressable by the court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998). The rules are somewhat relaxed for plaintiffs who, like Massachusetts and Sheriff Arpaio, seek to vindicate a procedural right, including "the right to challenge agency

action unlawfully withheld." *Massachusetts*, 549 U.S. at 517.

Procedural rights claims can proceed "without meeting all the normal standards for redressability and immediacy." *Id.* at 517-18 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). Massachusetts received a further benefit. As a sovereign state, it was "entitled to special solicitude in [the] standing analysis." *Id.* at 520.

Massachusetts, like Sheriff Arpaio, believed the federal government had "abdicated its [statutory] responsibility" to protect the State's interests. *Id.* at 505. The State, like the Sheriff, asked the Court to construe the meaning of a federal statute, "a question eminently suitable to resolution in federal court." *Id.* at 516. And Congress had authorized challenges to the EPA, *id.*, just as Congress has generally authorized the type of challenge Sheriff Arpaio now pursues, *see* 5 U.S.C. § 704; *see also Texas v. United States*, 787 F.3d 733, 751-52 (5th Cir. 2015).

The Supreme Court ultimately found that Massachusetts' injury lay in the potential loss of coastal land caused by the threat of rising seas. The Court said "the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts." *Massachusetts*, 549 U.S. at 526. Scientific evidence suggested a causal relationship between greenhouse gases and atmospheric warming. The Court brushed

aside EPA's argument that Massachusetts had only a generalized grievance widely shared by others. The global nature of global warming did not negate the state's claimed concrete injury. *See id.* at 522-23.

Just as EPA's inaction harmed Massachusetts' shores, inaction on immigration is said to harm Sheriff Arpaio's streets. Immigration, like global warming, affects the entire nation. But that does not mean no one has standing to challenge the concrete effects of the federal government's immigration policies. "[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.' *FEC v. Akins*, 524 U.S. 11, 24 (1998)." *Massachusetts v. EPA, at page 515.*

Based on these facial similarities, someone in Sheriff Arpaio's shoes may well believe he has standing. After all, *Massachusetts* sets out a "loosened standard" under which "*any* contribution of *any* size to a cognizable injury" seems to be "sufficient for causation, and *any* step, no matter how small," seems to be "sufficient to provide the necessary redress." Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1078 (2009). Under that elastic framework, the *risk* of harm, however tenuously linked to the challenged government action, appears to suffice to show standing.

B. Precedents on Standing Were Modified by *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007)

This Court should address how *Massachusetts v. EPA* has rendered prior standing precedents now bad law, whether intended or not.

The Respondents have standing to challenge the Petitioners' refusal to enforce current law by adopting their illegal regulatory programs. As this Court found in *Massachusetts v. EPA*:

> EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent," *Lujan*, 504 U.S., at 560, and there is a "substantial likelihood that the judicial relief requested" will prompt EPA to take steps to reduce that risk, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79. Pp. 12-17."

Id. at 521-522; *see also id.* at 507-514.

On the question of redressability of the harm to the Petitioners by the relief sought, it is important to note that in *Massachusetts v. EPA*, the plaintiffs there did not sue industrial actors who actually emit the carbon dioxide. Instead, those plaintiffs sued the regulator, the EPA. *Id.*

In that case, the EPA did not directly deprive Massachusetts of coastline. The harm was that EPA's regulations failed to prohibit *third parties* from emitting too much carbon dioxide. *Id.*

The Petitioners here challenge the role of third-party actors such that deportable foreign citizens as third parties will cause increased costs to the plaintiff states. A change in the law will cause third parties to respond in ways that injure them.

But that was not the analysis this Court used in *Massachusetts v. EPA*. As here, those plaintiffs there sought a regulatory environment actually enforcing the statute. Those plaintiffs had standing on the view that industrial actors would change their behavior of emitting carbon dioxide in response to a change in the regulations.

Here, the Respondents similarly have standing where the law clearly influences the behavior of deportable foreign citizens, thus imposing costs upon the Respondents.

CONCLUSION

For the foregoing reasons, Sheriff Joseph M. Arpaio, acting as *amicus curiae*, respectfully urges this Court to grant the relief requested by the Respondents and affirm the decision of the Fifth Circuit concerning the preliminary injunction.

Sheriff Arpaio respectfully urges this Court to reach the constitutional issues, as well as the related standing issues, as there has been an increasing tendency by presidents of both major parties to exceed their executive powers. This is true here and this Court must

now make it clear that this is not constitutionally acceptable for this president or future presidents. A more important role for this Court cannot be envisioned.

Respectfully submitted,

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